

IN THE HIGH COURT OF MANIPUR

AT IMPHAL

W.A. No. 44 of 2024

With

W.A. No. 45 of 2024

1. M/s Bhartia Infra Project Ltd. Having its head office at 201 Royal Arcade, Dr. B. Baruah Road, Ulubari, P.O. & P.S. Ulubari, Guwahati-781007
2. M/s GKC Projects Limited (Joint Venture) having its office at Sy. No. 9 (P). CII Green Building Lane, HITEC City, Kondapur, Hyderabad-500084, Telangana, India respectively.

The Appellant Nos. 1 and 2 are represented by the authorised Signatory namely Shri Ningombam Ibochouba Singh, aged about 52 years, S/o N. Nabakumar Singh of Chingamakha Phura Makhong, PO & PS Singjamei, Imphal West District, Manipur-795008.

Appellants

-Versus-

1. The Union of India through the Secretary, Ministry of Road Transport & Highways, Transport Bhawan, 1, Parliament Street, New Delhi – 110001.
2. The State of Manipur represented by the Commissioner (Works), Govt. of Manipur, Old Secretariat Complex, Babupara, Imphal West, Manipur-795001.
3. The Project Director-cum-Chief Engineer, Externally Aided Projects (EAP), Public Works Department (PWD), Manipur having its office at PWD Complex, Khuyathong, P.O. & P.S. Imphal, Imphal West District, Manipur.

Respondents

BEFORE

**HON'BLE THE CHIEF JUSTICE MR. D. KRISHNAKUMAR
HON'BLE MR. JUSTICE A. GUNESHWAR SHARMA**

For the appellants :: Mr. HS Paonam, Sr. Advocate
For Respondent No. 1 :: Mr. S. Vijayanand Sharma, Sr. PCCG
For Respondent Nos. 2 & 3 :: Mr. M. Devananda, Addl. A.G.
Ms. N. Jyotsana, Advocate
Date of reserving Judgment & Order :: **20.02.2025**
Date of Delivery of Judgment & Order :: 15.04.2025

JUDGMENT & ORDER
(CAV)

JUSTICE D. KRISHNAKUMAR, CJ:

[1] The present writ appeals have been filed by the appellants, challenging the impugned common judgment and order dated 28.08.2024 passed by the writ court, dismissing W.P. (C) No. 477 of 2024 and W.P. (C) No. 521 of 2024.

[2] The point for consideration of present appeals is whether the appellants/writ petitioners are eligible to participate in the contract.

[3] Learned senior counsel appearing for the appellants, submits that the appellants/petitioners participated in the NIT bearing Specific Procurement Notice (SPN)/ Tender No. 22/PD/PIU/MUR/PROC-CW/2024/01 dated 15.03.2024 for Package No. & Name: MUR-CW-04 & Construction of Rigid Pavement and Lined Drain of Selected Roads under Highway South Division – Package-4: Total Road Length – 111.182 km. The appellants/petitioners have submitted the technical bid as per the terms and conditions of the notification.

[4] The technical bids submitted by the tenderers, including the appellants were opened on 24.05.2024 in the office of respondent No. 3 and the result of the same was declared on 29.07.2024 rejecting the technical bid submitted by the appellants on the ground of non-responsive whereas technical bid of AMRIL-IRCON Joint Venture was accepted and updated in the official website of the employer.

The technical bid of the appellants was rejected on the ground of non-performance contract in view of the termination of contract of the petitioner by the Railway Department vide order dated 26.09.2022.

[5] The appellants filed two writ petitions, (i) W.P. (C) No. 477 of 2024 praying for writ of mandamus for not making applicable the terms and conditions as mentioned at the Footnote of the Qualification Criteria of Clause No. 3 of the Tender Document for procurement of works and (ii) W.P. (C) No. 521 of 2024 praying for writ of certiorari for setting aside the impugned rejection of the technical bid.

[6] Learned senior counsel appearing for the appellants submitted that they have submitted Form CON-2 Historical Contract Non-performance, voluntarily disclosing Non-performed contracts under Clause 3.2.1 of the tender notification and one of such non-performance occurred in the year 2022. Learned senior counsel appearing for the appellants would submit that as per the terms and conditions stipulated in the guidelines, they cannot reject the application on the ground of non-performance, since the appellants company did not come in the list of non-performance.

[7] Learned senior counsel for the appellants, relying upon the clarification letter dated 17.07.2024 sent by the Deputy Chief Engineer/Construction-IV/Imphal, NF Railway, wherein it has been clarified that the appellant Agency M/s Bhartia Infra Project Limited is not declared as "Non-Performer" by the Railway Department, and states that the appellants company has satisfied the eligibility criteria to participate in the said contract work and the rejection order needs to be set aside.

[8] According to the learned senior counsel for the appellants, the aforesaid technical bid was opened on 24.05.2024 and by communication dated 28.05.2024, respondent No. 3 wrote a letter to the Deputy Chief Engineer, Con NF Railway, Imphal-IV, requesting the latter to provide an update on the status of historical contract non performance of the contractors including the appellants.

On 12.06.2024, in response to the aforesaid letter, the Deputy Chief Engineer, CON, NF Railway, Imphal has sent a communication to the respondent No. 3, which reads as follows:

"In reference to the above mentioned subject, it is intimated that the following two agencies were engaged under the jurisdiction of Dy. Chief Engineer/Construction-IV/Imphal and the following information are provided as desired vide the referred letter.

1. Bhartia Infra Project Ltd:

- The contract agreement No. CON/J-I/2612 dated 12.03.2020 with M/s Bhartiya Infra Project Ltd. was terminated vide letter No. W/60/CON/J-I/EMB/2019/RT-1/2612 dated 26.09.2022. Despite the termination of the aforementioned contract, M/s Bhartiya Infra Project Ltd. has several other ongoing*

contracts with the railway which are under progress as per schedule.

- *A legal case concerning this termination is currently ongoing, and the court has not given any ruling in this regard.*

2.IRCON International Ltd:

- *IRCON International Ltd. is presently engaged in the work of the final location survey for the Imphal-Moreh railway project.*
- *The work under this project is ongoing and progressing as per the schedule.*

This is for your kind information please.”

[9] The appellants submitted representation on 13.07.2024 requesting the authority not to reject their technical bid. The appellants submit another representation dated 17.07.2024 to the Deputy Chief Engineer, Railway, Imphal. On the same day, i.e, on 17.07.2024, the Deputy Chief Engineer, Con NF Railway, Imphal-IV has sent a clarification letter to the effect that since the debarment as mentioned in the termination order was only for non-participation in the tender for executing the balanced tender work, and there has been no adverse remark on the ongoing works awarded before and after the termination order dated 26.09.2022 and further clarified that based on the overall performance, M/S Bhartia Infra Project Limited is not declared “non-performer” by the Railway Department.

[10] On the same day, the appellants also made another representation dated 17.07.2024 furnishing the aforesaid clarificatory letter to the tender inviting authority to consider for not making applicable of the terms and conditions as mentioned at the Footnote of the qualification criteria of clause No. 3 of the Tender Bidding Documents.

[11] In the meantime, the appellants filed the aforementioned writ petitions. As the two writ petitions were filed by the same petitioners the same were clubbed together and taken up for hearing.

[12] According to the appellants/petitioners, they have relied upon the documents as stated above and made the aforementioned submission before the writ court in the writ petitions. However, the writ court did not consider in proper perspective and both the writ petitions were dismissed by the learned Single Judge.

Hence, the present writ appeals have been filed before this Court.

[13] Learned senior counsel appearing for the appellants, strongly relies upon the Clause 3 of the Tender Notification which prescribes eligibility and qualification criteria to be fulfilled by the bidder. The applicant has to satisfy that Non-performance of a contract did not occur as a result of contractor default since January 1, 2019. Clause 32.3 of Section I, it provides that if a Tenderer does not meet the qualifying criteria specified in Section III, Evaluation and Qualification Criteria, its Tender shall be rejected by the Employer and may not subsequently be made responsive by correction of the material deviation, reservation or omission.

[14] Learned senior counsel appearing for the appellants, has strongly relying upon the aforesaid documents of the railway department stating that they are eligible for participating in the tender works and

therefore the decision of the respondents is arbitrary and discriminatory. Therefore, the appellants seeks to set aside the order of the writ court by granting relief to the writ petitioners to open price bids and declare the writ petitioners eligible to participate in the said contract work.

[15] Mr. M. Devananda, learned Additional Advocate General, appearing for the State respondents, drew the attention of this Court by relying upon eligibility and qualification criteria in clause 3.2 Historical Contract Non-Performance, which provides as follows:

			Compliance Requirements				Documentation
3.2	Historical Contract Non-Performance						
3.2.1	History of Non-Performing Contracts	Non-Performance of a contract did not occur as a result of contractor default since January 1, 2019	Must meet requirement	Must meet requirement	Must meet requirement	N/A	Form Con-2

[16] Non-performance of the contract did not occur as a result of the contractor default since January 1, 2019. Considering his voluntary declaration before the authority concerned, he is not eligible to be considered. Therefore, his application was rejected at the time of evaluation of the technical bid. As per the tender notification, the evaluation committee has opened the said technical bid on 24.05.2024 and declared the result on 29.07.2024 with remarks "Substantially Non-Responsive Technical Part of the Tender" so far as the appellants are concerned and hence the appellants company is rejected for the aforesaid construction of rigid pavement of lined drain of selected roads under Highway South Division- Package No. 4: Total Road Length – 111.182 km.

[17] Learned Additional Advocate General, further submits that the Evaluating Committee has scrutinized the application of the appellants based on the eligibility criteria as per terms and conditions in the tender notification issued by the department. The appellants have voluntarily disclosed non-performed contract in the said application under Clause 3.2.1 of the tender notification but subsequently, they submitted representations on 13.07.2024 and 17.07.2024 addressed to the Railway authority and they got clarification reply from the railway department on 17.07.2024 by stating that the appellants company is not declared a non-performer by the Railway. The technical bid was opened on 24.05.2024. Hence, the petitioner's tender was rejected based on the voluntary disclosure in the application form.

[18] This Court has directed the respondents to produce the original records before this Court and the same is produced and the officer concerned is also present before the Court to assist the Court.

[19] Heard the parties and perused the materials on record. The Government of Manipur, through its Public Works Department has planned to take up a project on improvement of roads within Imphal City with rigid pavement including concrete lined drains with finance assistance from Asian Infrastructure Investment Bank.

Therefore, one administrative decision was taken to invite tender for the aforesaid project work for Improvement Of Roads Within

Imphal City With Rigid Pavement Including Concrete Lined Drains for the following works.

Sl. No.	Package Name	IOCT No. and Package No.	Bidding Documents
1.	Construction of Rigid Pavement and Lined Drain of Selected Roads under Imphal West Division Package 1: Total Road Length 172.858 km	MN/PWD/EAP/MURDAMIP/PROC-W/2024/01 MUR-CW-01	Tender document issued separately
2.	Construction of Rigid Pavement and Lined Drain of Selected Roads under Imphal East Division (ED-1) - Package 2: Total Road Length -141.032 km	MN/PWD/EAP/MURDAMIP/PROC-W/2024/02 MUR-CW-02	Tender document issued separately
3.	Construction of Rigid Pavement and Lined Drain of Selected Roads under Imphal East Division (ED-2) - Package 3: Total Road Length -122.209 km	MN/PWD/EAP/MURDAMIP/PROC-W/2024/03 MUR-CW-03	Tender document issued separately
4.	Construction of Rigid Pavement and Lined Drain of Selected Roads under Highway South Division Package 4: Total Road Length 111.182 km	MN/PWD/EAP/MURDAMIP/PROC-W/2024/04 MUR-CW-04	Tender document issued separately

[20] The Specific Procurement Notification (SPN) for the e-procurement of the work was issued on 15.03.2025 by the Project Director, Externally Aided Projects, PWD Manipur and the notice was advertised in National Newspaper, namely, The Indian Express (New Delhi

Publication) and the same was also uploaded in the e-procurement website **<https://www.manipurenders.gov.in>** to enable access by the intending tenderers and pursuant to the said notification, the tenderers were invited to submit their application through the e-procurement website as per the terms and conditions on or before 14:30 hours of 24.05.2024, issued *vide* its Addendum No. 3 dated 09.05.2024.

[21] The Tender Evaluation Committee comprising of the following officers has been constituted on 05.03.2024.

1. Mr. Y Joykumar Singh, <i>Project Director-cum-Chief Engineer, EAP, PWD Manipur</i>	: Chairman
2. Mr. Ch. Bishwachandra Singh, <i>Additional Chief Engineer-II, EAP, PWD Manipur</i>	: Member
3. Mr. Salam Somorendro Singh, <i>Chief Finance Officer, PWD Manipur</i>	: Member
4. Ms. Rubee K, <i>Sr. Project Manager, EAP, PWD Manipur</i>	: Member Secretary
5. Mr. Serto Teneilen Kom, <i>Project Manager, EAP, PWD Manipur</i>	: Member

Since Mr. Y. Joykumar Singh, Project Director-cum-Chief Engineer, EAP, PWD Manipur retired from the Government Service on attaining age of superannuation, a new Tender Evaluation Committee comprising of the following officers are reconstituted on 09.07.2024 :

1. Mr. Ch. Bishwachandra Singh, <i>Project Director, EAP, PWD Manipur</i>	: Chairman
2. Mr. Ch. Utam Singh, <i>Superintending Surveyor of Works, PWD, Manipur</i>	: Member
3. Mr. Salam Somorendro Singh, <i>Chief Finance Officer, PWD Manipur</i>	: Member
4. Ms. Rubee K, <i>Sr. Project Manager, EAP, PWD Manipur</i>	: Member Secretary
5. Mr. Serto Teneilen Kom, <i>Project Manager, EAP, PWD Manipur</i>	: Member

[22] Subsequent to the reconstitution of the Tender Evaluation Committee, by office memorandum dated 11.07.2024, the Bid Evaluation Committee for procurement of Civil Works and Consultancy Firms for "Manipur Urban Road Drainage and Asset Management Improvement Project" is requested to attend meeting for finalisation of "evaluation of technical part of the tender" for procurement of civil works for the above project by its notice dated 15.03.2024, at the office chamber of the Project Director, PIU, EAP, PWD, Manipur on 12.07.2024 at 15:30 Hrs IST. The said notice was issued by the Project Director, PIU, EAP, PWD, Manipur cum Chairman, Bid Evaluation Committee. Copies also marked to the members of the committee.

[23] Technical Bid Evaluation Reports for procurement of Civil Contractors was submitted vide Proceeding No. 22/PD/PIU/MUR/PROC-W/2024/8824 dated 12.07.2024.

The committee has carried out evaluation of the technical bid for procurement of civil contractor and come to the conclusion that tenderer, GKC-BIPL JV fails to meet the requirements under Historical Contract Non-Performance and therefore, the Evaluation Committee concludes that the technical bid submitted by the GKC-BIPL JV is substantially non-responsive to the Technical requirements specified in Section –III Evaluation and Qualification Criteria of the Tender Document and thus, based on the decision of the evaluation committee, the respondents have rejected the tender application of the appellants.

[24] The evaluation committee has rejected the appellants' tender based on the declaration made under clause 3.2.1 in the form which has been submitted along with the application. The appellants company has approached the Project Director by submitting their representation dated 17.07.2024, after the opening of the tender technical bid on 24.05.2024 and finalised on 12.07.2024.

[25] The appellants company had submitted the tender form by voluntarily disclosing under Clause 3.2.1. of the tender notification that he is a non-performer. Therefore, the Tender Evaluation Committee has rejected his application by relying on his voluntary declaration in the tender form. The appellants company has submitted the clarificatory letter issued by the railway authority dated 17.07.2024 which is subsequent to the tender document submitted by the appellant, after the respondent authority has opened the technical bid on 24.05.2024 and the Evaluation Committee finalised the technical bid on 12.07.2024 and thus, there is no error or illegality committed by the respondent highway authority for rejecting his technical bid.

[26] The Tender Evaluation Committee have rejected the technical bid of the appellants, based on the voluntary disclosure made in the tender application form, now the appellants cannot take u-turn and seek for the reconsideration, contrary to the said terms and conditions of the tender notification and therefore the said contention of the appellants cannot be accepted and the same is liable to be rejected.

[27] It would be relevant to rely on the decision in the case of **Directorate of Education and Ors. Vs. Educomp Datamatics Ltd. and Ors**, reported in **AIR 2004 SC 1962**, wherein the Hon'ble Court held that:

12. it has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias, it is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

Further, in the case of **Jagdish Mandal Vs. State of Orissa and Ors.**; reported in **(2007) 14 SCC 517**, the Hon'ble Supreme Court has elaborately considered the scope of judicial review under Article 226 of the Constitution of India, following the decision rendered in **Sterling Computers Ltd. V. M & N Publications Ltd** reported in **AIR 1996 SC 51** and **Tata Cellular V. Union of India** reported in **AIR 1996 SC 11**, wherein the Hon'ble Supreme Court has held that the scope of judicial review of administrative action in exercise of power in awarding contract is limited scope. The Hon'ble Supreme Court further relying upon **Raunaq International Ltd. v. I.V.R. Construction Ltd.** reported in **AIR 1999 SC 393**.

The aforesaid judgments have been followed in the decision in the case of **Jagdish Mandal (Supra)**, wherein the Hon'ble Supreme Court has held as follows:

"19 . Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.

Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

[28] There are also decisions of the Hon'ble Supreme Court holding that terms and conditions of the tender form shall be strictly adhered by the tenderers and the though there is some mistake or error committed in the

tender form, the tenderer or the person concerned cannot seek any remedy to interfere with the said rejection of the said tender application form. It is relevant to rely upon the following decisions of the Hon'ble Supreme Court in :

(i) **W.B. State Electricity Board V. Patel Engineering Co.** reported in **2001 (2) SCC 451**, wherein the Hon'ble Supreme Court has observed as follows:

"23. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as "a repetitive systematic computer typographical transmission failure". It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of respondents 1 to 4 to correct the same before submission of the bid. Had they been vigilant in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one-and-a-half months of opening of the bids will also be violative of clauses 24.1, 24.3 and 29.1 of the ITB."

"31..... It is equally in public interest to adhere to the rules and conditions subject to which bids are invited....."

(ii) **Rajsekhar Gogoi V. State of Assam**, reported in **2001(6) SCC 46** wherein the Hon'ble Supreme Court has held as follows:

"10. This clearly shows that it was imperative for a tenderer to furnish full information as required so that the same could be verified by the Deputy Commissioner or any other authorized person "before settlement of shop to the tenderer" (emphasis added). In the present case, such an opportunity was clearly denied to the authorities when respondent 4 had not furnished the requisite particulars along with her tender.

11. We are therefore, of the opinion that as the tender itself of respondent 4 was liable to be rejected because of lack of particulars as stated hereinabove, no further question arises....."

In the aforesaid decisions of the Hon'ble Supreme Court, it has been held that it is imperative for the tenderer or a person concerned to furnish the correct details or full information as required in order to be verified by the authority concerned. In the case on hand, though they have furnished the details in Clause 3.2.1 in the tender form, by considering the said details furnished in the said clause of the tender form, the technical bid was rightly rejected by the authority concerned and therefore, on same principle where the Hon'ble Supreme Court in several decisions held that there shall not be any liberal consideration of terms and conditions of the tender and the tenderer has to strictly adhere to the instructions as per the tender conditions and in these circumstances, the contention of the petitioner is untenable and the same cannot be accepted.

[29] On analysing the aforesaid decisions of the Hon'ble Supreme Court, we are of the view that considering the facts and circumstance of the case where the appellants company has made a declaration in the tender form and based on that its technical bid was rejected and therefore, in the contractual matters, the respondents cannot conduct the roving enquiry on the eligibility of the appellants. Though the said declaration may be an error on the part of the appellants but it cannot be a ground to interfere in the process of the tender conducted by the respondent authority and further, it is brought to the notice of this Court that the tender was opened on 24.05.2024 and thereafter the Evaluation Committee had finalised the tender process and recommended for the approval for issuing the work order to the successful tenderer and the aforesaid tenderer has not been

made a party in the aforesaid proceedings and therefore, we are not inclined to accept the contention of the appellants to interfere with the order of the writ court and therefore, the aforesaid writ appeals are liable to be dismissed.

[30] The writ Court had observed in its finding that under Clause 3.2.1 of the tender document which provided that if the tenderer does not meet the qualifying criteria specified in Section III Evaluation and Qualification Criteria, its tender shall be rejected by the employer and may not subsequently be made responsive by correction of the material deviation, reservation or omission. Therefore, the learned Single Judge came to the conclusion that in view of the above provision, information of declaration made by the petitioners in the aforesaid Form Con-2 Historical Contract Non-Performance, voluntarily disclosing Non-performed contracts under Clause 3.2.1 of the tender notification cannot be corrected and the technical bid of the petitioners cannot substantially be made responsive. So the learned Single Judge has made it clear that the appellants has voluntarily made his disclosure in the tender form and therefore the contention of the appellants was rejected by the writ court.

[31] At this juncture, learned counsel for the appellants made a submission that in view of the finding of the order passed in the writ petitions, the appellants company is not considered eligible to participate in the future tender notification issued by the respondent Highway authority. Therefore, he seeks for a clarification for permitting the appellants company to participate in the tender notification in future.

[32] In response to the aforesaid submission of the appellants, learned Additional Advocate General, Manipur, has fairly agreed that the appellants company can participate in the future tender process, if otherwise eligible and the same cannot be rejected based on the finding of the learned Single Judge.

[33] In view of the discussion in the preceding paragraphs and considering at any angle, in the light of decisions of the Hon'ble Supreme Court cited (**supra**), there is no merit in the appeals and therefore, the writ appeals are liable to be dismissed with the observation that there is no legal bar for the appellants company to participate in the future tender notification, if any, issued by the respondent authority, if otherwise eligible.

The writ appeals are dismissed with the above observation.

JUDGE

CHIEF JUSTICE

Sandeep